STATE OF MICHIGAN IN THE SUPREME COURT

ELIZABETH A. COOK,

Plaintiff-Appellee,

Supreme Court No.

Court of Appeals No. 250727 Ju 42465

Ingham County Circuit Court No. 02-1399 NI

B. N. Nicherson

CHRISTOPHER W. HARDY,

VS.

Defendant-Appellant.

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NOTICE OF HEARING

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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OPINION BEING APPEALED & RELIEF SOUGHT

In this "auto negligence" lawsuit, Plaintiff-Appellee, ELIZABETH A. COOK, is seeking noneconomic damages for injuries she sustained to her right leg in an accident that occurred on December 15, 1999. According to Plaintiff, a vehicle driven by Defendant-Appellant, CHRISTO-PHER W. HARDY, struck her as she was walking with three companions down an alley in East Lansing, Michigan.

The dispositive issue is whether Plaintiff sustained a "serious impairment of body function", which is a threshold requirement for recovering noneconomic damages under the No-Fault Act, MCL 500.3135(1). Specifically, the question is whether Plaintiff's injuries affected her general ability to lead her normal life -- the third component of the statutory definition of "serious impairment of body function". MCL 500.3135(7).

The nature and extent of Plaintiff's injuries are undisputed. Plaintiff's right tibia and fibula were fractured near the sites of fractures Plaintiff previously sustained in a sledding accident. A titanium rod (which had been surgically inserted after the sledding accident) was slightly bent, but required no corrective measures.

Plaintiff's medical treatment was conservative and of short duration. A cast was applied to Plaintiff's lower right leg at a local emergency room immediately after the accident. Plaintiff was given one dose of Tylenol #3, and a prescription for Vicodin. Plaintiff was not hospitalized for her injuries.

Subsequently, Plaintiff received a walking cast, which was removed six weeks after the accident. Plaintiff used crutches for eight weeks after the accident. At that point, x-rays revealed that the fractures were well healed. Plaintiff's rotation was excellent. Plaintiff received no further medical treatment, and has no residual impairment.

Plaintiff identified three aspects of her life that were affected by her injuries -- school, work and recreational activities.

At the time of the accident, Plaintiff had registered for the last two classes she needed for an associate's degree -- photography and an independent film study. When she returned to community

college in early January 2000, she took the photography class and deferred the independent study to the next semester. Plaintiff received her degree in mid-2000.

Plaintiff quit her job at a film processing company after the accident because she was concerned that the cast might impede her ability to work. There is no evidence that Plaintiff's treating physician recommended that she take time off from work.

In late January 2000 -- while she was still using crutches -- Plaintiff began working 10 to 15 hours per week as an intern, editing commercials and films. In August 2001, Plaintiff moved to Chicago, Illinois, where she began working as a freelance film set costumer. Some projects required Plaintiff to work 14 hours per day, six days per week.

As to her recreational activities, Plaintiff maintained that she could no longer run or engage in any "impact" sports. Plaintiff admitted that those restrictions were self-imposed. Plaintiff's injuries also prevented her from taking a three-day trip to Cancun in late December 1999. Plaintiff took two longer vacations in the summer of 2000, and in 2001.

In mid-2003, the parties filed cross-motions for summary disposition on the "serious impairment" issue, pursuant to MCR 2.116(C)(10). The parties agreed that (1) the nature and extent of Plaintiff's injuries were undisputed; (2) Plaintiff had sustained an objectively manifested impairment; and (3) an important body function had been impaired, i.e., walking. The parties' sole dispute was whether the "altered lifestyle" requirement of MCL 500.3135(7) was satisfied.

Ingham County Circuit Court Judge Beverley Nettles-Nickerson held that Plaintiff's injuries had not affected her general ability to lead her normal life. Judge Nettles-Nickerson explained that the physical restrictions resulting from the injuries were either self-imposed or lasted only six weeks. Moreover, Plaintiff missed only one film course during her recuperation, she had resumed her preaccident activities (including skateboarding and vacations), and had obtained employment as a costume maker. (App D, 13-14). Accordingly, Judge Nettles-Nickerson granted Defendant's motion for summary disposition, and denied Plaintiff's cross-motion. (App E).

While Plaintiff's appeal of right was pending in the Court of Appeals, this Court issued Kreiner v Fischer, 471 Mich 109 (2004). On February 24, 2005, the Court of Appeals issued an unpublished 2-1 decision in Plaintiff's favor. (App F).

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Judges Janet T. Neff and Jessica R. Cooper concluded that Plaintiff had sustained a serious impairment of body function because her "impairment was significant and extensive". (App F, Majority Op, 3). While acknowledging that the duration of Plaintiff's impairment was relatively short (i.e., six to eight weeks), the majority observed that Plaintiff could not work, attend school, or engage in recreational activities during that time period because her "multiple acute fractures" required a hard cast and crutches. The majority disagreed with the trial court's comments that Plaintiff resumed her normal activities within six weeks because Plaintiff did not complete her independent study course until six months after the accident, and she had to cancel a planned vacation. (App F, Majority Op, 2-3). The majority concluded:

"... Under the totality of the circumstances in this case, including the seriousness and extent of the fractures, the nature and extent of treatment with casting and crutches, and the lifestyle alterations, all support a finding that plaintiff suffered a serious impairment of body function as a matter of law."

(App F, Majority Op, 3). Accordingly, the trial court's order was reversed, and the case was remanded for entry of summary disposition in Plaintiff's favor. (<u>Id</u>.).

Judge Brian K. Zahra dissented because he believed "the trial court properly found that the injuries sustained by plaintiff did not affect the course or trajectory of her normal life." (App F, Dissent, 1). Judge Zahra characterized the interruption of Plaintiff's normal life activities (i.e., education, employment and recreation) as "minimal and temporary". (Id.).

Judge Zahra explained that Plaintiff's education was minimally interrupted, i.e., her class load was reduced for only one semester, and she received her associate's degree the following semester. Although Plaintiff did not return to her part-time job after the accident, Judge Zahra noted that no physician had placed any restrictions on Plaintiff's ability to work. Moreover, Plaintiff began a 10 to 15 hour per week internship less than one month after the accident. As to her recreational activities, Judge Zahra noted that Plaintiff resumed skateboarding shortly after the accident. Finally, Plaintiff had never asserted that "impact" recreational activities were a significant part of her life. (App F, Dissent, 1).

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Judge Zahra believed that the facts of this case "are virtually indistinguishable from the facts" in Straub v Collette, the companion case to Kreiner". (App F, Dissent, 1). After recounting the activities that were affected by Mr. Straub's hand injuries, Judge Zahra concluded:

> ". . . The Supreme Court concluded that the plaintiff in Straub had not sustained a serious impairment of a body function because plaintiff's injuries were `not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive. . . . ' Id. at 135-136. The same result is warranted in this case."

(App F, Dissent, 2).

Defendant contends that interlocutory relief from this Court is warranted because the Court of Appeals' majority opinion is clearly erroneous and will cause material injustice if allowed to stand. MCR 7.302(B)(5). The parties agree that the "serious impairment" issue must be decided as a matter of law because the relevant facts are undisputed. As explained in the attached brief, application of all of the rules which this Court adopted in Kreiner yields only one conclusion -- Plaintiff's temporary leg injuries did not affect her general ability to live her entire normal life. The trial court and Judge Zahra reached the right result for the right reasons.

As it currently stands, Plaintiff has been granted summary disposition on the "serious impairment" issue. Other issues remain for trial -- Defendant's liability and the amount of Plaintiff's noneconomic damages.

If Defendant (as well as the trial court and Judge Zahra) are correct, trial is completely unnecessary. To conserve the limited time and resources of the trial court and jurors, as well as additional expense to the parties, appellate relief should be granted by this Court now, rather than later.

Defendant further contends that peremptory relief is warranted because the applicable law and facts are clear. For the reasons stated in Judge Zahra's dissent, Defendant requests this Court to peremptorily reverse the Court of Appeals' majority decision, and reinstate the trial court's order granting summary disposition to Defendant. MCR 7.302(G)(1). Alternatively, Defendant requests that the within Application for Leave to Appeal be granted.

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STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction to decide this application for leave to appeal pursuant to MCR 7.302(C)(2)(b), for the following reasons.

On August 11, 2003, Ingham County Circuit Court Judge Beverley Nettles-Nickerson entered an order which (1) granted Defendant, CHRISTOPHER W. HARDY's motion for summary disposition, and (2) denied Plaintiff, ELIZABETH A. COOK's cross-motion for summary disposition. (App E). On August 27, 2003, Plaintiff timely filed a claim of appeal with the Court of Appeals.

On February 24, 2005, the Court of Appeals issued an unpublished per curiam decision. By a 2-1 vote, the Court of Appeals reversed and remanded this case to the trial court for entry of an order granting summary disposition to Plaintiff. (App F).

Within 42 days of the Court of Appeals opinion, Defendant timely filed this application with this Court.

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TABLE OF CONTENTS

INDEX OF A	AUTHORITIESi
STATEMEN	T OF JURISDICTIONAL BASIS ii
STATEMEN	T OF QUESTION PRESENTED iii
STATEMEN	TT OF FACTS
A.	Historical Facts
В.	Trial Court Litigation
C.	Court of Appeals' Opinion
ARGUMEN'	Γ:
	I. PLAINTIFF DID NOT SUSTAIN A "SERIOUS IMPAIR-MENT OF BODY FUNCTION", AS DEFINED IN MCL 500.3135(7), BECAUSE THE TEMPORARY INJURIES TO HER RIGHT LOWER LEG DID NOT AFFECT PLAIN-TIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE
RELIEF	

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INDEX OF AUTHORITIES

CASES	PAGE(S)
Cassidy v McGovern, 415 Mich 483 (1982)	
DiFranco v Pickard, 427 Mich 32 (1986)	
Kern v Blethen-Coluni, 240 Mich App 333 (2000)	
<u>Kreiner v Fischer</u> , 471 Mich 109 (2004)	passim
LaHousse v Hess, 125 Mich App 14 (1983)	
Straub v Collette, 471 Mich 109 (2004)	9,14
STATUTES & COURT RULES	
MCL 500.3135(1)	1,10
MCL 500.3135(2)(a)	
MCL 500.3135(2)(a)(i)	7
MCL 500.3135(3)(c)	5
MCL 500.3135(7)	1,6,8, 10
MCR 2.116(C)(10)	6
MCR 2.116(I)(2)	6
MCR 7.302(C)(2)(b)	iii

STATEMENT OF QUESTION PRESENTED

I. DID PLAINTIFF'S RIGHT LEG FRACTURES, WHICH FULLY HEALED SIX WEEKS AFTER THE AUTO ACCIDENT WITHOUT ANY RESIDUAL IMPAIRMENT, AFFECT PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE, AS REQUIRED FOR RECOVERY OF NONECONOMIC DAMAGES UNDER MCL 500.3135(1) & (7)?

The trial court answered "No".

The Court of Appeals, by a 2-1 vote, answered, "Yes".

Plaintiff-Appellee contends the answer is "Yes".

Defendant-Appellant contends the answer is "No".

STATEMENT OF FACTS

The dispositive issue in this appeal is whether the auto accident injuries sustained by Plaintiff-Appellee, ELIZABETH A. COOK, affected her general ability to lead her normal life, as required for recovery of noneconomic damages under §3135 of the No-Fault Act, MCL 500.3135(1) & (7). The relevant facts are undisputed.

A. Historical Facts.

The accident at issue occurred on December 15, 1999. (App A, 11; App B, 12/16/99 note; App C, 1). Plaintiff (who was 21 years old [App A, 4]) sustained fractures to her right tibia and fibula in that accident. As will be more fully explained, those fractures healed without complications within six weeks.

Plaintiff had previously fractured the same bones in a sledding accident that occurred in March 1999. (App A, 11-12, 14). During Plaintiff's six-day hospitalization after that accident, a titanium rod was surgically inserted in her lower right leg. (<u>Id.</u>, 13-14; App C, 1).

Over the next six months, Plaintiff's follow-up care was rendered by Larry Pack, M.D., at Family Orthopaedic Associates in Flint, Michigan. (App A, 13). According to Dr. Pack's office notes, the tibial fracture took the most time to heal. (App B, 3/25/99 to 9/30/99 notes).

Plaintiff wore a cast for four months, and a removable leg brace thereafter. (App A, 13-14, 16). During the first 1-1/2 months after the sledding accident, Plaintiff had to use a wheelchair. (<u>Id</u>., 14). Thereafter, Plaintiff used crutches. (<u>Id</u>., 14).

At the time of the sledding accident, Plaintiff was a student at Lansing Community College, majoring in art with an emphasis on motion pictures. (App A, 9-10). After that accident, Plaintiff dropped all of her classes except one. (<u>Id</u>., 14).

¹The following facts are contained in the material appended to this application. All of the appended material was filed in the lower courts' records.

Plaintiff resumed her normal school schedule in fall 1999. (App A, 10, 15). She also worked at Moto Photo in East Lansing, doing film processing and enlargements, printing photos, and copying slides. (<u>Id</u>., 20).

Plaintiff's last visit to Dr. Pack prior to the auto accident was on September 30, 1999. (App B, 9/30/99 note). Her tibial fracture was "healing very nicely", i.e., "it [was] starting to fill in". (Id.). Dr. Pack believed that Plaintiff could discontinue wearing her leg brace, but recommended that Plaintiff refrain from certain activities, i.e., "no skiing or jumping or playing basketball". (Id.).

Plaintiff discontinued wearing her leg brace in late November/early December 1999. (App A, 13). Plaintiff maintained that by December 1999, she was no longer receiving any medical treatment, and had no physical restrictions. (<u>Id.</u>, 12-13, 15).

Plaintiff finished her fall semester classes, and took her last final exam on December 15, 1999. (App A, 17-18, 27). About 10:00 p.m. that evening, Plaintiff, her brother, and two friends left Plaintiff's East Lansing apartment and walked to a nearby bar (The Peanut Barrel). (Id., 27-29). They consumed a pitcher of beer over the next 1-1/2 hours. (Id., 29).

The foursome left the bar through the rear door, and walked down the adjoining alley towards Plaintiff's apartment. (App A, 31-32). According to Plaintiff,² a car "sped around the corner" as the foursome neared the end of the alley. (<u>Id</u>., 32-33). The car "kind of hit" Plaintiff's brother's hand as it passed the group. (<u>Id</u>.).

Plaintiff's brother turned around and "said something" to the driver. (App A, 32).

Plaintiff looked back, and saw the driver "slam on the brakes". (<u>Id</u>.). When she noticed the car's reverse lights go on, she told her companions, "He is reversing". (<u>Id</u>., 32, 35).

Plaintiff's three companions "got out of the way", but she could not. (App A, 32-34). The car's rear bumper struck Plaintiff's right leg. (<u>Id</u>., 15, 32, 36). Plaintiff was thrown eight to ten feet by the impact. (<u>Id</u>., 15). The car left the scene. (App C, 1).

²Defendant denies that the following scenario occurred.

Plaintiff was taken to the emergency room of Sparrow Hospital in Lansing. (App A, 15; App C). There was a contusion on, and some soft tissue swelling in, Plaintiff's right lower leg. (App C, 1).

X-rays revealed a re-fracture of the mid-shaft of the tibia, and a possible re-fracture of the fibula. (App C, 1). The tibial rod in Plaintiff's right leg also appeared "to have been bent slightly, approximately 4 cm. from the proximal end." (<u>Id</u>., 1-2). Surgical intervention was not necessary, however. (App A, 16). Plaintiff was given Tylenol #3 "with excellent results" (App C, 2), and a cast was applied to Plaintiff's lower leg. (App A, 15-16).

Plaintiff wanted to receive follow-up care from Dr. Pack. (App C, 2). She was given a prescription for pain medication (Vicodin), and discharged from Sparrow Hospital in the morning. (App A, 15; App C, 2).

Later that day, Plaintiff went to Dr. Pack. (App A, 16; App B, 12/16/99 note). Dr. Pack's office note for that date reads in pertinent part:

"... She looks like she may have a new oblique fracture of her fibula proximal through an old fracture site. She is very tender there and the bone is displaced. The remainder of her x-rays look fine. She has a little abrasion over the anterior tibia but there are no signs of any other problems. Her knee is not tender. It is not swollen. Most of her tenderness is on the anterior shaft of the tibia and the fibular area. So, I think we can go back to the DonJoy boot. I told her she probably will be sore for about three to six weeks. She can start partial weightbearing as tolerated. Work on her range of motion. We will see her in six weeks."

(App B, 12/16/99 note).

Subsequently, Plaintiff received a walking cast. (App A, 17). Plaintiff continued to use crutches because "it didn't feel good to walk" without them. (<u>Id</u>.). The cast was removed in late January 2000, i.e., six weeks after the auto accident. (<u>Id</u>., 26, 36-37).

On February 10, 2000, Plaintiff returned to Dr. Pack for a follow-up exam. (App B, 2/10/00 note). His findings were as follows:

"This patient is walking with a crutch. Her x-rays today look great. The tibia is healed and the alignment is excellent. The rotation is excellent as well. I think that she can ditch the crutch.

I do not think that she is wearing her PTB AFO [i.e,. leg brace]. We will see her back in six months."

(App B, 2/10/00 note). Plaintiff received no further treatment for her auto accident injuries, and resumed nearly all of her normal activities (including skateboarding). (App A, 37-38).

Thirteen months later (i.e., on March 29, 2001), Plaintiff was re-examined by Dr.

Pack. (App B, 3/29/01 note). His findings were as follows:

"She is seen for follow up on her fractured tibia. She is doing very well today. She has full range of motion and no complaints. Our plan is to discharge her and see her prn [i.e., as occasion requires]. Her range is good. She has no complaints at this time."

(App B, 3/29/01 note).

During her May 5, 2003 deposition, Plaintiff identified three aspects of her life that were affected by her auto accident injuries -- school, work, and recreational activities.

Prior to the accident, Plaintiff had registered for the last two classes she needed for an associate's degree -- photography and an independent film study. (App A, 18-19). When she returned to college in early January 2000, Plaintiff took only the photography class. (<u>Id</u>., 18). That class required Plaintiff to attend lectures, do research, and make three short "continuous action" videos. (<u>Id</u>., 22-23).

Plaintiff deferred her independent study to the 2000 summer semester because her leg injury prevented her from carrying camera equipment and lights. (App A, 18-19). The preceding semester, Plaintiff worked out the details of her film project. (<u>Id</u>., 20). Plaintiff finished her independent study, and received her degree, in mid-2000. (<u>Id</u>., 9, 24).

Plaintiff did not return to her job at Moto Photo after the accident. (App A, 20-21). She was concerned that if she became busy, it would not have been easy for her to "run around" with her cast. (<u>Id</u>.). Plaintiff could not recall whether Dr. Pack had recommended that she take time off from work, or whether she had imposed that restriction on herself. (<u>Id</u>., 21).

In late January 2000 -- while she was still using crutches -- Plaintiff began an internship at Optic Productions in downtown Lansing. (App A, 21-22). Plaintiff worked 10 to 15

hours per week editing commercials and film. (<u>Id</u>.). After completing her independent film study, Plaintiff did a couple of editing jobs at Optic Productions, and worked on independent movies in Detroit. (<u>Id</u>., 24).

In August 2001, Plaintiff moved to Chicago, Illinois. (App A, 5). At the time of her deposition, Plaintiff was working as a freelance film set costumer for movies, theater productions, and a few commercials. (<u>Id</u>., 4-5). Typically, movies required Plaintiff to work a minimum of 14 hours per day, six days per week, for 1-1/2 to 3-1/2 months. (<u>Id</u>., 5). Plaintiff had obtained work in Michigan, Iowa, Illinois, Wisconsin, and Missouri, which involved driving to those locations. (<u>Id</u>., 8).

As to her recreational activities, Plaintiff maintained that she could no longer run or engage in "any activities that involve impact", such as "any sports". (App A, 37). Plaintiff admitted that all of those restrictions were self-imposed, i.e., no physician had imposed those restrictions. (Id., 37-38).

Finally, Plaintiff's auto accident injuries prevented her from taking a pre-planned three-day trip to Cancun in late December 1999. (App A, 26). Plaintiff subsequently went on two other vacations -- a five-day trip to Puerto Viarta in summer 2000, and a two-week trip to Hawaii in 2001. (<u>Id.</u>, 26-27).

B. Trial Court Litigation.

On September 12, 2002, Plaintiff filed this "auto negligence" suit in Ingham County Circuit Court against the driver of the vehicle which struck her -- Defendant-Appellant, CHRISTOPHER W. HARDY. In her complaint, Plaintiff alleged that she had sustained a serious impairment of body function as a result of the accident, which entitled her to recover noneconomic damages from Defendant. (Complaint, ¶¶ 10, 15[b]-[e], [g]-[h]).3

³Plaintiff's complaint also requested economic damages (e.g., work loss) in excess of those amounts available under the No-Fault Act. (Complaint, ¶15[j]). See MCL 500.3135(3)(c). Plaintiff never pursued those additional claims in the trial court, however. Accordingly, only noneconomic damages are at issue in this appeal.

In his answer, Defendant denied liability and asserted numerous affirmative defenses, including that Plaintiff had not suffered a serious impairment of body function. (Affirmative Defenses, ¶9).

In June 2003, Defendant moved for summary disposition on that defense pursuant to MCR 2.116(C)(10). (Defendant's Motion for Summary Disposition, 1; Brief, 4). Since there was no factual dispute concerning the nature and extent of Plaintiff's injuries, Defendant argued that the "serious impairment" issue must be decided by the trial court as a matter of law. (<u>Id.</u>, Motion, ¶4; Brief, 6).

Defendant did not contest Plaintiff's assertion that she had sustained an objectively manifested impairment of an important body function -- the first two components of §3135(7)'s definition of "serious impairment of body function", MCL 500.3135(7). (Id., Brief, 6).

Instead, Defendant argued that Plaintiff could not satisfy the third statutory requirement -- Plaintiff's impairment did not affect her general ability to lead her normal life. (Id., Motion, ¶5; Brief, 6, 8). Defendant emphasized that any effect on Plaintiff's life would not suffice, per this Court's recently issued "remand" order in Kreiner v Fischer, 468 Mich 885 (2003). (Id., Brief, 7).

Defendant explained that Plaintiff's fractures healed within six weeks, without any residual impairment. (<u>Id</u>., Motion, ¶5; Brief, 3, 9). Thereafter, Plaintiff resumed nearly all of her normal activities, obtained a job as a costumer (which involved long hours), and took two vacations. (<u>Id</u>., Brief, 8-9). As to Plaintiff's decision not to return to her job at Moto Photo, and her discontinuation of certain vigorous sports, Defendant emphasized that those restrictions were self-imposed, not physician-imposed. (<u>Id</u>., Motion, ¶5; Brief, 8, 10-11).

In her response, Plaintiff agreed that there was no factual dispute as to the nature and extent of her injuries. (Plaintiff's Response & Cross-Motion for Summary Disposition, ¶1). Plaintiff maintained that she was entitled to summary disposition on the "serious impairment" issue pursuant to MCR 2.116(C)(10) & (I)(2). (Id., Response, 1-2; Brief, 4-5, 9).

Plaintiff explained that her cast and crutches prevented her from running and walking properly, returning to her job at Moto Photo, and taking her planned vacation to Cancun.

(Id., Brief, 7). In addition, she had to cancel her independent study for one semester because she could not work with the necessary heavy equipment. (Id.). Finally, she could no longer engage in numerous sports. (Id.).

"Because these activities were all central to Plaintiff's normal lifestyle before the accident", Plaintiff maintained that her post-accident inability to engage in those activities had affected her general ability to lead her normal life. (<u>Id</u>., Brief, 7). Plaintiff contended that her good recovery did not change the fact that she suffered a serious impairment of body function immediately after the accident. (<u>Id</u>., 8-9).

On August 6, 2003, a hearing was held on the parties' cross-motions. (App D). At the conclusion of that hearing, Judge Beverley Nettles-Nickerson granted Defendant's motion for summary disposition, and denied Plaintiff's cross-motion, for the following reasons:

"Based on the -- under Michigan no fault law and the applicable case law, the Court does agree with defense attorney that this is not a serious impairment of a body function as a matter of law pursuant to MCL 500.3135(2)(a)(i). Plaintiff's impairment did not affect her general ability to lead her normal life as her restrictions were imposed -- or self imposed and lasted only six weeks. She missed one semester of a film course, and she was able to resume her activities shortly thereafter. Therefore, the Court feels that the third prong of the three prong test under the no fault act was not met. Under those circumstances, the threshhold [sic] limits recovery to serious impairment. Not to imply that Plaintiff has not suffered an injury or any injury, this Court is not persuaded that Plaintiff has met the serious impairment part.

"The facts provide that subsequent to the accident Plaintiff's activities did include skateboarding, vacations, and employment as a costume maker on various film sets. However, she was only--her lifestyle was only altered before and after by a minimum of six weeks. I don't feel that that meets the threshold.

(App D, 13-14). The resulting Order was entered August 11, 2003. (App E).

13) 963-8200

C. Court of Appeals' Opinion

Plaintiff timely filed a claim of appeal with the Court of Appeals. While that appeal was pending, this Court issued its seminal decision on §3135(7)'s "altered lifestyle" requirement -- <u>Kreiner v Fischer</u>, 471 Mich 109 (2004). Subsequently, the parties submitted briefs discussing <u>Kreiner</u>.

The Court of Appeals placed this appeal on its summary calendar. (See App F, Majority Op, 1). In an unpublished decision issued February 24, 2005, the Court of Appeals held (by a 2-1 vote) that Plaintiff had sustained a serious impairment of body function, as a matter of law. (App F).

In their majority opinion, Judges Janet T. Neff and Jessica R. Cooper focused on the following facts:

"Here, plaintiff, a very active student, suffered multiple, acute fractures of her right leg. She spent six to eight weeks in a cast, was not able to work and had to cancel an independent study course. She was forced to cancel a planned vacation. Even after her cast was removed her activities were limited: A film student, she was unable to carry around the required lighting and film equipment for her studies and her recreational activities, such as skateboarding, were limited."

(App F, Majority Op, 3).

The majority acknowledged that the duration of Plaintiff's impairment was "relatively short". However, the impairment was deemed "significant and extensive", thereby satisfying the "serious impairment" threshold:

"We hold that plaintiff suffered a serious impairment of body function as a matter of law. While the duration of her impairment was relatively short — six to eight weeks — in that time she could not work, attend school, or engage in any of her usual recreational activities because she was in a hard cast and could not move about without crutches. Even after her cast was removed, her physical activities were limited. She was forced to cancel an independent study course which she [] was not able to complete until more than six months after the accident. She was forced to cancel a planned vacation. The activities the trial court focused on, to which plaintiff returned, did not resume until six months or more after her injuries. It is clear to us that plaintiff's impairment was significant and extensive.

"We do not read *Kreiner* to require that plaintiffs must suffer serious impairment permanently in order to be entitled to meet the requirements of serious impairment of important body function. Indeed, *Kreiner* held that impairments of a short duration can be sufficient to meet the serious impairment threshold. *Id.* at 134. Under the totality of the circumstances in this case, including the seriousness and extent of the fractures, the nature and extent of treatment with casting and crutches, and the lifestyle alterations, all support a finding that plaintiff suffered a serious impairment of body function as a matter of law."

(App F, Majority Op, 2-3). Accordingly, this case was reversed and remanded for entry of an order granting summary disposition to Plaintiff. (<u>Id</u>., 3).

In his dissent, Judge Brian K. Zahra recounted the relevant facts as follows:

"Plaintiff identified three aspects of her life that were affected by her injury: (1) her education; (2) her employment; and (3) her recreational activities. The interruption to her normal life activities in these three areas was minimal and temporary. Plaintiff's education was only minimally interrupted, as her class load was reduced for only one semester and she received her associate's degree the following semester. Plaintiff did not return to her part time job after her accident. However, less than one month after the accident plaintiff commenced an internship in which she worked ten to fifteen hours a week. Further, no physician placed any restrictions on plaintiff's ability to work. Self-imposed restrictions do not establish an injury that affects one's ability to lead a normal life. Kreiner, supra at 133, n 17. Plaintiff maintains she can no longer engage in `impact' sports. However, plaintiff resumed skateboarding shortly after the accident and, significantly, plaintiff never asserted that participation in impact recreational activities was a significant part of her life."

(App F, Dissent, 1).

Judge Zahra believed that "[t]he facts of this case are virtually indistinguishable from the facts in *Straub v Collette*, the companion case to *Kreiner*". (App F, Dissent, 1). After recounting the facts in <u>Straub</u>, Judge Zahra concluded:

"... The Supreme Court concluded that the plaintiff in *Straub* had not sustained a serious impairment of a body function because plaintiff's injuries were `not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive. . . . ' *Id.* at 135-136. The same result is warranted in this case."

(App F, Dissent, 2).

I. PLAINTIFF DID NOT SUSTAIN A "SERIOUS IM-PAIRMENT OF BODY FUNCTION", AS DEFINED IN MCL 500.3135(7), BECAUSE THE TEMPORARY INJURIES TO HER RIGHT LOWER LEG DID NOT AFFECT PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE.

The <u>de novo</u> standard of appellate review applies to the trial court's rulings on the parties' cross-motions for summary disposition regarding the "serious impairment" threshold. <u>Kreiner v Fischer</u>, 471 Mich 109, 129 (2004).

To recover noneconomic damages in an "auto negligence" suit, a plaintiff must prove that she sustained one of the "threshold" injuries set forth in the No-Fault Act -- death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1);

Kreiner, supra, 115. "Serious impairment of body function" is statutorily defined as:

"an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

MCL 500.3135(7) (emphasis added).

If there is no factual dispute concerning the nature and extent of the plaintiff's injuries, the court must decide whether the plaintiff suffered a serious impairment of body function, as a matter of law. MCL 500.3135(2)(a); <u>Kreiner</u>, <u>supra</u>, 131-132. Here, the nature and extent of Plaintiff's auto accident injuries are undisputed -- a fractured right tibia, a fractured right fibula, and a small contusion/abrasion on her lower right leg.

The parties further agree that Plaintiff can satisfy the first two components of the "serious impairment" definition. That is, an important body function was impaired (e.g., walking), and the impairment was objectively manifested (e.g., by x-rays).

Finally, Defendant agrees that an impairment need not be permanent to be serious.

DiFranco v Pickard, 427 Mich 32, 40, 60 (1986); Cassidy v McGovern, 415 Mich 483, 505 (1982). As this Court explained in Kreiner, supra, 134, the fact "that the duration of the impairment is short does not necessarily preclude a finding of a `serious impairment of body function.'"

The sole disputed issue is whether Plaintiff's leg injuries affected her general ability to lead her normal life. In <u>Kreiner</u>, <u>supra</u>, 130-131, this Court defined and explained the key terms of that third statutory requirement as follows:

- "... Determining whether the impairment affects a plaintiff's `general ability' to lead his normal life requires considering whether the plaintiff is `generally able' to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.
- "... [D]etermining whether a plaintiff is `generally able' to lead his normal life requires considering whether the plaintiff is, 'for the most part' able to lead his normal life.

"In addition, to `lead' one's normal life contemplates more than a minor interruption in life. To `lead' means, among other things, 'to conduct or bring in a particular course.' Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's `general ability' to lead his normal life has not been affected and he does not meet the `serious impairment of body function' threshold."

(Italics in original; underlining added).

This Court also provided the following framework for deciding whether an impairment affected the plaintiff's general ability to lead her normal life:

- The starting point is identifying how the plaintiff's life has been affected, by how much, and for how long. <u>Id.</u>, 131.
- "Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." Id.
- In determining whether the course of the plaintiff's normal life has been affected, the court should compare the plaintiff's life before and after the accident, and consider the significance of any affected aspects on the course of the plaintiff's overall life. <u>Id.</u>, 132-133.
- Thereafter, the court must objectively analyze whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's general ability to conduct the course of her life. <u>Id.</u>, 133.

13) 963-8200

- "Merely `any' effect on the plaintiff's life is insufficient".
 Id. (italics in original).
- The following non-exhaustive list of objective factors can be considered in evaluating whether the plaintiff's general ability to conduct the course of her normal life has been affected:
 - (a) the nature and extent of the impairment;
 - (b) the type and length of treatment required;
 - (c) the duration of the impairment;
 - (d) the extent of any residual impairment;
 - (e) the prognosis for eventual recovery. <u>Id</u>.
- "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" that a residual impairment exists. <u>Id.</u>, n 17.
- "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." <u>Id.</u>, 137.

Application of <u>all</u> the aforestated rules yields only one conclusion -- Plaintiff's temporary leg injuries did not affect the course or trajectory of her entire normal life.

Plaintiff identified three aspects of her life that were affected by her injuries -- school, work and recreational activities.

As the trial court and Judge Zahra correctly noted, Plaintiff deferred taking only one class for only one semester. Plaintiff successfully completed her independent study, and received her associate's degree, in mid-2000. Thus, Plaintiff's education was minimally interrupted.

Plaintiff did not return to her part-time job at Photo Moto after the accident. There is no evidence that that work restriction was physician-imposed, however.

Plaintiff's subsequent work history demonstrates that this aspect of her life also was minimally affected. In late January 2000, while she was still using crutches, Plaintiff began working 10 to 15 hours per week at Optic Productions. After graduation, Plaintiff occasionally worked for that company, and on independent films in Detroit.

15 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226

In August 2001, Plaintiff moved to Chicago and began working as a freelance film set costumer for movies, theater and commercials. Movie work involved particularly long hours — at least 14 hours per day, 6 days per week, for 1-1/2 to 3-1/2 months. Plaintiff's work sometimes required her to drive significant distances.

Plaintiff maintains that she can no longer engage in any "impact" sports or recreational activities. Plaintiff has not completely discontinued her recreational activities, however. For example, she resumed skateboarding after the accident.

As the trial court correctly noted, Plaintiff's restrictions on her recreational activities were admittedly self-imposed. As Judge Zahra further noted, Plaintiff has <u>never</u> asserted that those activities were a significant part of her life. As to Plaintiff's decision to forego a three-day trip to Cancun in December 1999, Plaintiff more than made up for that inconvenience with much longer vacations to Puerto Viarta and Hawaii during the next two years.

Analysis of <u>Kreiner</u>'s five objective factors confirms that Plaintiff's injuries did <u>not</u> affect her general ability to continue living her normal life.

Plaintiff's fractures healed without complications within six weeks. Her treatment was conservative, i.e., she wore a cast for six weeks, used crutches for eight weeks, and apparently took pain medication only for a short period immediately after the accident. Neither surgery nor physical therapy was necessary for Plaintiff's successful recuperation.

As evidenced by Dr. Pack's office notes, the duration of Plaintiff's impairment was minimal, and there was no residual impairment. Less than 24 hours after the accident, Dr. Pack anticipated that Plaintiff would be sore for three to six weeks. He told Plaintiff to start partial weightbearing as tolerated, and to work on her range of motion. (App B, 12/16/99 note).

Eight weeks after the accident, Plaintiff's "x-rays looked great", i.e., her fractures had healed, the alignment was excellent, and she no longer needed crutches. In addition, Plaintiff's rotation was excellent. (App B, 2/10/00 note).

Plaintiff's next and last visit to Dr. Pack occurred 15 months after the accident.

Plaintiff was "doing very well", i.e., she still had full range of motion and had no physical complaints. Accordingly, Dr. Pack formally discharged Plaintiff from his care. (App B, 3/29/01 note).

Plaintiff has analogized her situation to several decisions which pre-date this Court's opinion in <u>Kreiner</u>. In the following cases, the plaintiff's fracture(s), medical treatment, recuperation, and residual physical problems were sufficiently significant to satisfy the "serious impairment" threshold:

- Cassidy v McGovern, 415 Mich 483 (1982) -- The plaintiff was hospitalized for 18 days for two broken bones in his lower right leg. Over the next seven months, plaintiff wore a cast and used a walker because of dizzy spells. The fractures healed within nine months, but plaintiff continued to complain of pain in his leg due to possible scar tissue. Plaintiff cut back on some of his farm activities, and described the functioning of his leg as 50% of normal.
- <u>LaHousse v Hess</u>, 125 Mich App 14 (1983) -- The plaintiff sustained a broken clavicle and a fractured left leg, which required surgical insertion of a steel rod in plaintiff's thigh and five days of hospitalization involving traction. During the ensuing three months, plaintiff required a wheelchair, walker, or crutches.
- <u>Kern v Blethen-Coluni</u>, 240 Mich App 333 (2000) -- Femur fracture sustained by the 9-year-old plaintiff required surgical installation of an external fixator with four pins drilled into the bone, and six days of hospitalization (four of which involved traction). During the ensuing 11 weeks, plaintiff was carried, used a wheelchair, or "hobbled" on his uninjured leg. A second surgery was required to remove the fixator and pins. Although the fractures were well healed after four months, plaintiff's physician imposed three additional months of physical restrictions to avoid re-injury.

Plaintiff's uneventful, six-week recuperation from her leg fractures pales in comparison.

As Judge Zahra correctly held, Plaintiff's situation is far more akin to <u>Straub v Collette</u> - the companion case to <u>Kreiner</u>. There, Mr. Straub's injuries to his non-dominant hand consisted of a broken bone in his little finger, tendon injuries in two fingers, and open wounds. Mr. Straub underwent outpatient surgery to repair the tendons, wore a cast about one

(313) 963-8200

month, took pain medication for two weeks after the surgery, and completed two sessions of physical therapy. The injuries healed within two months, and no further medical treatment was required. Mr. Straub estimated that his hand was 99% back to normal, although he could not completely straighten his middle finger or close his hand, which caused decreased grip strength.

Mr. Straub's hand injuries temporarily prevented him from working. He missed two months of work as a cable lineman, returned to work part-time for three weeks, and resumed full time employment three months after the accident. Since his recuperation coincided with deer hunting season, Mr. Straub could not operate his bow shop. Mr. Straub also missed four months of work as a guitarist for a band that performed on weekends. Finally, Mr. Straub had difficulty performing household chores, yard work, and repairs on his property during the first three months after the accident.

This Court concluded that Mr. Straub had <u>not</u> sustained a serious impairment of body function, for the following reasons:

"... Given that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub's general ability to live his normal life was not affected. There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The temporary limitations Straub experienced do not satisfy the statutory prerequisites. Considered against the backdrop of his pre-impairment life and the limited nature and extent of his injuries, we conclude that Straub's post-impairment life is not so different that his `general ability' to lead his normal life has been affected. Because the course of Straub's normal life has not been affected, he failed to satisfy the 'serious impairment of body function' threshold for recovery of noneconomic damages. . . . "

Kreiner, 471 Mich at 135-136 (emphasis added).

The same reasoning and result is warranted here. Plaintiff's leg injuries were not extensive or pervasive; her recuperation was short, unremarkable, and complete; and she has no residual impairment. The temporary limitations and inconveniences Plaintiff experienced did <u>not</u> change the course or trajectory of Plaintiff's post-accident life. Accordingly, Plaintiff's general ability to lead her entire normal life was <u>not</u> affected by the auto accident.

313) 963-8200

In conclusion, the trial court and Judge Zahra reached the right result for the right reasons. Since Plaintiff's injuries did <u>not</u> result in a serious impairment of body function, Defendant is entitled to summary disposition as a matter of law.

RELIEF

WHEREFORE, Defendant-Appellant, CHRISTOPHER W. HARDY, respectfully requests this Honorable Court to:

- (1) PEREMPTORILY REVERSE the Court of Appeals' majority decision issued February 24, 2005, for the reasons stated by Judge Brian K. Zahra in his dissenting opinion; and
- (2) REINSTATE the Order entered by the Ingham County Circuit Court on August 11, 2003, which granted Defendant's motion for summary disposition, and denied Plaintiff's cross-motion for summary disposition.

Alternatively, Defendant-Appellant requests that this Application for Leave to Appeal be GRANTED, and after full briefing and oral argument, that the aforestated relief be GRANTED.

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Dated: March 30, 2005